(26,428)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 961.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

1 For Supreme Court, United States of America.

H. TURNER and S. MORTON TURNER, Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

VS.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

From Supreme Court of Georgia.

2 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, the plaintiffs in error, and J. P. Wade, Sheriff of Brooks County, Georgia, the defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any
3 treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said H. Turner and S. Morton Turner as executors of the estate of J. O. Morton, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within (30) thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13 day of March, in the year of our Lord one thousand nine hundred and eighteen.

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by
WM. H. FISH,
Chief Justice Supreme Court
of the State of Georgia.

Filed in office March 13, 1918, W. E. Talley, Deputy Clerk Supreme Court of Georgia.

4 In the Supreme Court of the State of Georgia, October Term, 1917.

UNITED STATES OF AMERICA, *ss:*

To J. P. Wade, Sheriff of Brooks County, Georgia:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of Georgia, wherein H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton Deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia, this 13th day of March, 1918.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Due and legal service of the within citation and of the grant of the writ of error to the Supreme Court of the United States of America, in the case in said citation mentioned, is hereby acknowledged, and all other and further service and notice is hereby waived. This March 13th, 1918.

STANLEY S. BENNET,
Atty. for J. P. Wade, Sheriff of Brooks Co., Ga.

Filed in office March 13, 1918, W. E. Talley, Deputy Clerk Supreme Court of Georgia.

5 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

On this the 13th day of March, A. D. 1918, came on to be heard the application of H. Turner and S. Morton Turner as Executors of the estate of J. O. Morton, deceased, for a writ of error in the above stated case, and it appearing that the application ought to be granted, it is therefore ordered, that the writ of error be allowed, the plaintiff in error giving a bond conditioned as the law directs in the sum of five hundred dollars, which is to operate as a supersedeas, and that a true copy of the record, assignments of error, and all proceedings had in the case in the Supreme Court of the State of Georgia shall be transmitted to the Supreme Court of the United States properly certified as the law directs that the said court may inspect the same and do what according to law should be done.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Filed in Office, March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

6 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Know all men by these presents, that we, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased, the plaintiffs in error, as principal, and W. A. Jones as surety, are held and firmly bound unto J. P. Wade, Sheriff of Brooks County, Georgia, in the sum of Five Hundred ($500) Dollars, to be paid to the said obligee, his successors, representatives and assigns, to the payment of which to be well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this the 13 day of March, 1918.

Whereas the above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse

the judgment rendered in the above entitled action by the Supreme Court of the State of Georgia,

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

H. TURNER, [L. S.]
S. MORTON TURNER, [L. S.]
As Executors of the Estate of
J. O. Morton, Deceased.
W. A. JONES, [L. S.]

7 Hon. William H. Fish, Chief Justice Supreme Court of Georgia:

The attached bond and the surety thereon, tendered by the plaintiffs in error in the case of Turner et al., Executors, v. J. P. Wade, Sheriff, is satisfactory.

STANLEY S. BENNET,
Attorneys for the Defendant in
Error, J. P. Wade, Sheriff.

The within and foregoing bond tendered by H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, as principal, and W. A. Jones, as surety, as well as the surety thereon, is hereby approved, and ordered to operate as a supersedeas.

This March 13, 1918.

WM. H. FISH,
Chief Justice Supreme Court of Georgia.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

8 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Decided and Judgment Affirmed February 15th, 1918.

UNITED STATES OF AMERICA, ss:

To the Honorable the Chief Justice of the Supreme Court of the State of Georgia:

Now comes H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, the above named plaintiffs in error,

by their attorneys, John D. Little, Arthur G. Powell, Marion Smith and Max F. Goldstein, and complain and allege that in the above entitled matter, to-wit, the case of H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, plaintiffs in error, v. J. P. Wade, Sheriff of Brooks county, Georgia, defendant in error, on the 15th day of February, 1918, final judgment was rendered against petitioners by the Supreme Court of the State of Georgia, in which final judgment and the proceedings had prior thereunto in said cause certain errors were committed to the prejudice of said H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That said Supreme Court of the State of Georgia is the highest court of the State of Georgia in law or in equity in which a decision in this suit and in this matter could be had.

The plaintiffs in error, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, further show that in said action there was drawn in question the validity of a
9 statute of, and authority exercised under the State of Georgia, on the ground of their being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of their validity, as will appear from the record, proceedings, decision and final judgment in said Supreme Court of the State of Georgia.

Wherefore, the said H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Georgia for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

This 21 day of February, 1918.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Petitioners.

10 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Decided and Judgment Affirmed February 15, 1918.

Assignment of Errors.

Now come H. Turner and S. Morton Turner, in their capacity as Executors of the Estate of J. O. Morton, deceased, the said plaintiffs in error, and respectfully submit that in the record, proceedings,

decision and final judgment of the Supreme Court of the State of Georgia, in the above stated matter, there is manifest error in that, to-wit:

First, that the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an act of the General Assembly of Georgia approved August 14, 1913, (found in Georgia Laws for 1913, pages 123 et seq.) and especially so much of said section of said Act as provides that if the arbitrators selected in pursuance of its provisions for the purpose of adjudging and assessing the value of the tax-payer's property fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax-assessors, the decision of the board of county tax-assessors, (a decision to be made without giving the tax-payer any opportunity to be heard on the question of the value of the property) shall stand affirmed and be binding in the premises, is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,
11 liberty or property without due process of law.

Second, that the Court erred in affirming the judgment of the superior court of Brooks county, Georgia, dismissing the plaintiffs' petition seeking redress against the enforcement of the statute aforesaid and the portion thereof above described, against the petitioners and their property, on oral demurrer, made by the defendant, on the ground that the plaintiffs' petition set forth no cause of action; and in holding that said statute and the portion thereof complained of are constitutional and do not deprive the plaintiffs of their property without due process of law.

Third, that the court erred in holding and deciding that, notwithstanding the plaintiffs in error had not had any opportunity to be heard before the county board of tax-assessors on the question of the value of their property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax-assessors, and notwithstanding it is this decision or finding of the board of county tax-assessors which is being enforced against the plaintiffs in error and their property, and notwithstanding that such enforcement is in pursuance of the provision of said statute, and notwithstanding that the only provisions for any appeal from or review of said decision or finding of said board of county tax-assessors is by demand for an arbitration, and notwithstanding the plaintiffs in error complied fully with the provisions of said statute in attempting to obtain a hearing before and a decision by arbitrators selected in pursuance of said statute, and though by no fault of the plaintiffs in error, but solely because the arbitrators failed to agree within ten days as to how much the ex parte finding of the county board of tax-assessors as to the value of the property for taxation should be reduced—all of the arbitrators who heard the evidence agreeing that it should be reduced in some amount—the only opportunity given them for a hearing on the question of the value

of their property for taxation was by the terms of said statute
12 of no avail or effect in determining or fixing the value of said property for taxation; and notwithstanding the statute in question makes no exception on account of the failure of the arbitrators to agree within ten days or any other exception whereby the question of the value of the property for taxation could be determined after opportunity for hearing, (though the failure to fix and determine the value within the time limited was due to no fault of the tax-payer), but by its terms makes the ex parte decision or finding of the county board of tax-assessors conclusive and binding in said event and substitutes the decision of the tribunal before which no opportunity for hearing is offered for the decision of the tribunal before which it is contemplated that a hearing shall be afforded—that notwithstanding all this is in pursuance of the statute itself, and the statute is being so enforced in the case presented, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment of the Constitution of the United States which forbids any state from *makes* or enforcing any law which deprives any person of his property without due process of law.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Plaintiffs in Error, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

13 (Endorsed:) In the Supreme Court of the State of Georgia, October Term, 1917. H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, Plaintiffs in Error, v. J. P. Wade, Sheriff of Brooks County, Georgia, Defendant in Error. Petition for Writ of Error and Assignments of Error Thereon. John D. Little, Arthur G. Powell, Marion Smith, Max F. Goldstein, Attorneys for Petitioners.

14 In the Supreme Court of the State of Georgia, October Term, 1917.

H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. Wade, Sheriff of Brooks County, Georgia, Defendant in Error.

To the Clerk of the Supreme Court of Georgia:

Please make transcript of the following named portions of the record in the above entitled matter and transmit to the Supreme Court of the United States in connection with the writ of error from the

Supreme Court of the United States to the Supreme Court of Georgia therein:

1. The original petition of H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, deceased, and the amendment thereto.
2. The judgment of the superior court of Brooks county, Georgia, rendered May term, 1917, dismissing the plaintiffs' action.
3. The bill of exceptions presented and filed by H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, deceased, certified by the judge of the superior court, together with certificates of the judge and entries of filing thereon.
4. The decision and judgment of the Supreme Court of Georgia and opinion of the Supreme Court of Georgia, including the opinion of the Supreme Court of Georgia which was rendered in the same case at the October term, 1916, upon the interlocutory application for injunction.
5. The petition for writ of error from the Supreme Court of the United States to the Supreme Court of Georgia.
6. The assignments of error filed in connection with said petition.
15 7. The order of the Chief Justice of the Supreme Court of Georgia, allowing the writ of error.
8. The writ of error.
9. The citation to the defendant in error and entries thereon.
10. The bond given by the plaintiff in error.
11. This præcipe for transcript.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Plaintiffs in Error.

This, March 13th, 1918.

Due and legal service of the foregoing præcipe is acknowledged, copy received, and further service waived, this, 13th day of March, 1918.

STANLEY S. BENNET,
Attorneys for J. P. Wade, Sheriff Brooks County, Ga., Defendant in Error.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

16 Supreme Court of Georgia.

Atlanta, February 15, 1918.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

S. M. Turner et al., exrs., v. J. P. Wade, sheriff.

This case came before this court upon a writ of error from the

superior court of Brooks county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $10.00.

17 298.

March Term, 1916.

22 Southern.

WADE Sheriff.

v.

TURNER et al., Executors.

Per Curiam:

The sixth section of the tax-equalization act (Acts 1913, p. 123) requires an examination of the returns of the taxpayers of the county by the board of county tax assessors, and it is made their duty to assess and fix the just and fair valuation to be placed on the property returned. When any change is made in the valuation of the property of a taxpayer as fixed by him in his return, such taxpayer must be given notice of such change. If the taxpayer is dissatisfied, he may demand an arbitration and have a hearing before arbitrators as provided in the act. These arbitrators are required to render their decision in ten days, or else the valuation as fixed by the county board shall stand affirmed and shall be binding in the premises. In Vestal v. Edwards, 143 Ga. 368 (85 S. E. 187), section six of the act mentioned above was attacked as violative of the due-process clause of the constitution, for the reason, among others, "that the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax assessors, without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their value, or for any other cause that might
18 interfere to render such arbitration impossible within the time specified in the act." It was held that this part of the act was not obnoxious to the due-process clause of the constitution of this State or of the United States. The principle of the decision announced in that case is controlling, and it was erroneous to grant the injunction.

Judgment reversed. All the Justices concur except Fish, C. J., absent.

19 224.

Supreme Court of Georgia.

Case No. 439.

TURNER et al.

v.

WADE, Sheriff.

Per Curiam:

When this case was before the Supreme Court on a former occasion it was held: "The sixth section of the tax-equalization act (Acts 1913, p. 123) requires an examination of the returns of the taxpayers of the county by the board of county tax-assessors, and it is made their duty to assess and fix the just and fair valuation to be placed on the property returned. When any change is made in the valuation of the property of a taxpayer as fixed by him in his return, such taxpayer must be given notice of such change. If the taxpayer is dissatisfied, he may demand an arbitration and have a hearing before arbitrators as provided in the act. These arbitrators are required to render their decision in ten days, or else the valuation as fixed by the county board shall stand affirmed and shall be binding in the premises. In Vestal v. Edwards, 143 Ga. 368 (85 S. E. 187), section six of the act mentioned above was attacked as violative of the due-process clause of the constitution, for the reason, among others, 'that the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax-
20 assessors without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their value, or for any other cause that might interfere to render such arbitration impossible within the time specified in the act.' It was held that this part of the act was not obnoxious to the due-process clause of the constitution of this State or the United States. The principle of the decision announced in that case is controlling, and it was erroneous to grant the injunction." Wade v. Turner, 146 Ga. 600. After the return of the remittitur, an amendment to the petition was allowed, alleging that the failure of the arbitrators to agree upon the value of the property returned for taxation was not due to any fault of the plaintiff, but was due solely to the fact that each of the arbitrators placed a different valuation upon the property, which was more than that at which the board of equalizers had assessed, and that as none of the arbitrators would recede from his estimate of value, the time was allowed to expire within which the return of the arbitrators should be made, and the assessment by the board of equalizers became final by operation of law. The petition as amended was dismissed on motion. Held, that under the decision heretofore cited, that the sixth section of the tax-equalization act is not repugnant to

the due-process clause of the State and Federal constitutions, there was no error in the judgment dismissing the case on motion.

Judgment affirmed. All the Justices concur.

21 GEORGIA,
Brooks County:

Be it remembered: On April 7th, 1916, H. Turner and S. Morton Turner, as executors of the estate of J. O. Morton, deceased, filed in the Superior Court of Brooks County a petition in equity against J. P. Wade, the sheriff of Brooks County, Georgia; and during the May term, 1917, of said court also, under the approval and allowance of the court, filed an amendment to the petition.

Be it further remembered, that during said term of said court, viz. on the 17th day of May, 1917, His Honor Wm. E. Thomas, Judge of the superior courts of the Southern Circuit, then and there presiding, the defendant moved to dismiss the plaintiffs' petition (as amended) on the ground that the same set forth no cause of action; and on said day and date the court sustained said motion and entered final judgment dismissing said action.

To said judgment, ruling and decision of the court the plaintiffs, then and there excepted, now except and assign the same as error and say that the court erred in sustaining said motion and in dismissing said action on the ground that no cause of action is set forth in said petition.

Now within the time required by law and on this the 22nd day of May, 1917, came the plaintiffs, said H. Turner and S. Morton Turner, as executors of J. O. Morton, deceased, and present this bill of exceptions and pray that the same may be signed and certified that the errors complained of may be considered and corrected.

The sole opposite party, to wit, said J. P. Wade, the sheriff of Brooks County, is named as defendant in error.

There was no evidence to be considered, and no evidence is
22 material to a consideration of the errors complained of. Only the following portions of the record are material to a consideration of the errors complained of and are specified as such, viz:

The original petition.

The amendment thereto.

The judgment of the court at May term 1917 dismissing the action.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Plaintiffs in Error.

I do certify that the foregoing bill of exceptions is true, and contains all the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the Superior Court of Brooks County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the present term of the Supreme Court

that the errors alleged to have been committed may be considered and corrected. Presented May 22, 1917, and held by me without fault of the plaintiffs in error.

Signed this the 7th day of June, 1917.

W. E. THOMAS,
Judge Superior Courts Southern Circuit.

Clerk's Office, Superior Court Brooks County.

Quitman, Ga., June 19, 1917.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case stated therein; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

[SEAL.] W. R. KNIGHT, *Clerk.*

23 (Endorsed:) Case No. 439. March, 1917. Supreme Court of Georgia. Turner et al., exrs., versus Wade, sheriff. Bill of Exceptions. Filed in Office June 21, 1917. W. E. Talley, D. C. S. C. Ga.

Brooks Superior Court.

S. M. TURNER, Executor, et al., Plaintiff- in Error,

vs.

J. P. WADE, Sheriff, Defendant in Error.

Page.

The original petition .....
The Amendment.....
Judgment of the Court.....

GEORGIA,
Brooks County:

To the Superior Court of said County:

The petition of H. Turner and S. Morton Turner, in their capacity as executors of J. O. Morton, shows:

1. That petitioners are the duly qualified executors of the estate of J. O. Morton, deceased, and are citizens of said State and
24 County.

2. The defendant herein is J. P. Wade, Sheriff of said County.

3. For the year 1915 your petitioners, as executors of the estate of J. O. Morton, returned the properties of said estate subject to taxation in said county for taxation to the tax receiver of said county in the manner required by law, and in said return there was included

2826 acres of land which was returned at the value of $35,225.00, known as the city property of said estate at and for the value of $9,000.00.

4. The above lands were returned at their fair market value and constituted the taxable property of said estate subject to taxation in said county.

5. The board of county tax assessors in said county, consisting of C. T. Tillman, R. L. Groover and A. Morrison, purporting to act in pursuance of an act approved August 14th, 1913, found in Georgia Laws for 1913, pages 123 et seq., being the statute commonly known as the statute providing for the system of equalization of taxes, without having any hearing from your petitioners or any other representative of said estate before said board, proceeded to raise and increase the amount of said tax returns in the following respect, to wit: the value of the 2826 acres of farm land was raised from $35,225.00 to $70,650.00 and the value of the city property was raised from $9,000.00 to $10,000.00.

5½. The values this placed upon said property by said board of County assessors aforesaid was unreasonable and beyond its fair market value, and the said values were placed at the figures above named by said board of assessors arbitrarily and capriciously.

6. On the 24th day of June, 1915, said board of county assessors, having made said increase in the figures of said tax returns of petitioners in their representative capacity as aforesaid, gave notice thereof to your petitioners by notice, a copy of which is hereby attached marked exhibit "A."

7. Immediately thereafter, and within ten days, and in accordance with the provisions of section six of the act above recited, your petitioners gave notice to said board that they demanded an arbitration, and gave at the same time the name of their arbitrator, C. H. Ramsey, a citizen of said County.

8. Within three days thereafter said board named as its arbitrator, Robert B. Young, and these two selected as a third, Ed Pedrick.

9. These three, though thus selected as arbitrators, and though undertaking to act as such, never made any finding or came to any agreement or made any report or award or decision.

10. Said arbitrators were freeholders of the county.

11. The said arbitrators not having rendered a decision within ten days from the date of the naming of the arbitrator- by said board, which was named on the first day of July, 1915, the board of assessors held that their decision stood affirmed and was binding in the premises under the provision of the sixth section of the act of the General Assembly above recited and proceeded to enter their assessment of said taxes as final in the case.

12. The County tax assessors of said county in assessing the taxes assessed it on the basis of what it had been thus arbitrarily and unlawfully assessed by the said board of county assessors, and not upon the basis which had been returned by your petitioners.

13. On the 20th day of December, 1915, your petitioners went to W. L. Roberts, tax collector of said county, for the purpose of paying

the taxes due said property, and he demanded of them taxes at the rate at which the property had been assessed by said board of county tax assessors, but petitioners paid to him, instead of the amount he demanded, the sum of $555.02, which was the amount due on the property for its taxes for the year 1915 according to the rate of State and County taxes based upon the value at which said land had been returned for taxation.

14. Petitioners have paid in full all taxes lawfully due by said estate for the year 1915.

15. W. L. Roberts, the tax collector of said county, pro-
26 ceeded thereupon to issue execution against your petitioners in their representative capacity aforesaid, and against the property of said estate, for the remainder of the amount that exists between the $555.02 which your petitioners paid as taxes on said estate and the amount that the said taxes would have been if they had been assessed on the property at the rate of value fixed thereon by said board of county tax assessors, the amount of such fi. fa. being $417.01 and costs thereon.

16. Said fi. fa. was turned over to the defendant herein, the sheriff of said county aforesaid, and he has proceeded to levy the same upon the following property belonging to the said estate of J. O. Morton in the hands of your petitioners as executors to wit: The Southeast corner of block 19, in the southeast section of Quitman, Brooks County, Georgia, said tract footing 105 feet on Washington Street, and running back 75 feet. And unless he is enjoined therefrom, or otherwise prevented by the action of the court, will sell said property under said tax fi. fa., which is illegal and void for the reasons hereinafter set forth.

17. Petitioners show that said fi. fa. is void for the reason that they have paid all taxes due by said estate and lawfully collectible thereon, and because said fi. fa. was issued without any authority of law whatever; however, this statement is qualified by this explanation: said tax collector claims the right to issue said fi. fa. and said sheriff to enforce the same because it is provided in the sixth section of the act of the General Assembly aforesaid that in the event the assessors make corrections in the returns of tax payers and the tax payers demand an arbitration and the arbitrators are appointed, and if said arbitrators fail to make their decision within ten days from the date of the naming of the arbitrators by said board, the decision of said board of assessors shall stand affirmed and be binding in the premises, and that since the said board of assessors made the correction in the returns as has been for valuation recited above, and said arbitrators were appointed and failed to render a decision within ten days, that the finding of said board of
assessors is binding and controlling upon these petitioners,
27 and upon the tax collector and the sheriff in their official capacity as to the value of said property upon which said taxes should be assessed and paid.

18. Petitioners show to the court that to allow said assessment made by said board of assessors to stand, and to allow said execution

to proceed against said property, and for the court to give effect to that portion of the sixth section of the act aforesaid which provides in effect that in the event the arbitrators shall fail to make a decision within ten days the decision of the county board of tax assessors shall be final and binding, would be to take the property of these petitioners held in their representative capacity without due process of law in violation of article 1, section 1, paragraph 3, of the Constitution of this State, found in section 6359 of the Code of this State, which provides that no person shall be deprived of life, liberty or property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States wherein it is provided—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

19. Petitioners further show that said execution is proceeding against them in their representative capacity as aforesaid, and the property of said estate in their hands aforesaid, is about to be taken thereunder without due process of law, in violation of the provisions of the Constitutions of the State of Georgia and of the United States respectively, cited and referred to above, for the following reasons: the assessment referred to above was made by said county board of tax assessors without notice to your petitioners or any one else representing said estate, and without opportunity to them to be heard, and without there being any provision of law by which such notice could be given or such opportunity to be heard afforded. The Statute under which said board acted does not contemplate or provide for giving the tax payer a hearing before said board, but contemplates and provides that such hearing, or proceeding
28 in the nature of a hearing, as is to be had or afforded shall be before the arbitrators provided for in said statute, and this is the only opportunity for hearing which the statute contemplates or which was in fact afforded to your petitioners or said estate. The increase in valuation, upon the returns for taxation made by your petitioners as aforesaid, is not the result of any finding, judgment or decision rendered by said board of arbitrators, nor has said board of arbitrators rendered any decision or finding in any wise varying the valuation stated in the return made by petitioners but is solely the result of the act of said county board of tax assessors in increasing said return without notice and opportunity to be heard. Notwithstanding your petitioners have resorted to every means available, under the law of said State, and especially said statute, they have not been able to have said valuation adjudged or decided upon, or to have the action of said board of assessors in relation thereto reviewed or passed upon; and there is no provision in the law of said State by which petitioners could compel or obtain such judgment, decision or review by said board of arbitrators, they having failed, without fault on the part of petitioners, to render any finding, judgment or decision within the time presented in said statute.

20. Petitioners, therefore, further show that, since they have paid all taxes lawfully due upon said property at the fair and just valuation at which it was returned, and since said tax *executors* was issued and is about to be enforced for the sole purpose of compelling petitioners to pay tax upon the increase in valuation put thereon by said county board of tax assessors, without notice or opportunity to them or to said estate to be heard in relation thereto, said execution is void, and its enforcement would take the property of petitioners as representatives of said estate without due process of law in violation of the provisions of the Constitution of the State of Georgia and of the United States respectively cited, and quoted above.

21. Petitioners aver and assert that said act of the General Assembly referred to above, and especially so much of the Sixth section thereof as provides in substance that if the arbitrators
29 selected in pursuance of its provisions fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax assessors, the decision of said board of assessors shall stand affirmed and shall be binding in the premises, is unconstitutional, null and void because violative of the provisions of the Constitution of the State of Georgia, and of the United States, respectively, which have been cited, set forth and quoted above, for all the reasons set forth in the three proceeding paragraphs of this petition, and for the further reason that upon the question as to the valuation of the property upon which advalorum taxes are to be assessed (a question upon which, under each and both of the Constitutional provisions aforesaid, the tax payer whose property is undervalued, has the right to be heard before such question shall be foreclosed against him) the statute in question, and especially the particular portions specified above, makes the finding of the board of assessors, made without provision for such hearing, binding and conclusive of the question, in a case which is likely to arise, and which did in fact arise to the detriment of your petitioners in respect to the taxation now in question, namely where the arbitrators without fault of the tax payer fail to render a decision within the time prescribed in said act; so that under the provisions of the act aforesaid, the decision of the question of the contested valuation, which is given effect under said provisions of said statute, is not the decision of the board of arbitrators before which opportunity to be heard is given but the board of assessors, before which no opportunity to be heard is given.

22. Petitioners further show that the right to issue and to enforce said execution is claimed solely by reason of the provisions of said statute which is herein attached as being unconstitutional, null and void.

23. The Lands to which this controversy relates and to which the taxes relate are described as follows: The Plantation in Brooks County, Georgia, known as the J. O. Morton plantation, containing 2826 acres, and certain property in Quitman, Georgia, de-

30 scribed as follows: Block 20 in the southeast section of the said city of Quitman, bounded on the East by Washington and on the West by Lee Street; the southeast corner of block 19, in the southeast section; block 31 (except the northeast quarter) in the northeast section of the city of Quitman, said tract being bounded on the west by Jefferson Street, on the Southeast corner of Block 30 of the northeast section of the City of Quitman, said tract being occupied by Mrs. Nims.

24. Petitioners have no adequate remedy at law: Wherefore, they pray that the defendant, J. P. Wade, sheriff as aforesaid, be enjoined, both temporarily and permanently from attempting to execute said void fi. fa., or from selling or attempting to sell any of the property of said estate under said fi. fa., and specifically from selling or undertaking to sell the property upon which he has already levied as aforesaid under said fi. fa., and that process do issue requiring the said J. P. Wade, sheriff as aforesaid, to be and appear at the next term of said Superior Court to answer this complaint.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Petitioners' Attorneys.

GEORGIA,
Brooks County:

To *Mr.* Est. J. O. Morton:

The Local Board of County Assessors in pursuance of the duties imposed upon it by the Act approved August 14, 1913, has carefully scrutinized all of the tax returns, both personal and real, made by the tax payers of the County, and it finds that your return in respect to this item, to wit: 2826 acres 35,225 to 70,650 $25.00 per acre City property 9000 to 10,000, as to the value of $44,225, is not returned on equality with like property in the county, and is below the fair market value of such property; now, therefore, in order to comply with the requirements of said Act, so that each taxpayer
31 shall pay his proportionate share of taxation, the Board adjudges that the property above mentioned is of the value of $80,650, and it is hereby valued and assessed at that amount for taxation for the year 1915. Ten days allowed from this date to make complaint if not satisfied.

In Witness Whereof, we have set our hand and seal this 24th day of June, 1915.

LOCAL BOARD COUNTY ASSESSORS
BROOKS COUNTY. [SEAL.]

By Order of the Board.

J. W. PATE,
Clerk Board County Assessors.

Room 46 First National Bank Building, Quitman, Ga.

GEORGIA,
Colquitt County:

Personally appeared before me, S. Morton Turner, one of the petitioners, who on oath says that the facts stated in the foregoing petition, so far as come within his knowledge are true, and so far as derived from the knowledge of others he believes them to be true.

S. M. TURNER.

Sworn to and subscribed before me, this the 6th day of April, 1916.

W. E. THOMAS,
Judge S. C. S. C.

At Chambers, Valdosta, Georgia, 6th Day of April, 1916.

The foregoing petition read and sanctioned. Let the same be filed. Let the defendant, J. P. Wade, sheriff of Brooks County, Georgia, show cause before me at Quitman on the 27th day of May, 1916, why the injunction should not be granted, and in the meantime and until otherwise ordered he is enjoined and restrained as prayed for in the petition.

This the 6th day of April, 1916.

W. E. THOMAS,
J. S. C. S. C.

32 *Amendment.*

In Superior Court, Brooks County.

H. TURNER, Executor, et al.

vs.

J. P. WADE, Sheriff.

The Plaintiffs, with leave of the Court, amend their petition by adding to paragraph nine the following:

The failure of the arbitrators to come to any agreement and to make any report or award or decision in said matter was due to no fault of petitioners, or either of them, but [illegible]ne about solely by reason of the following fact: C. H. Ramsey, [illegible]e arbitrator selected by petitioners, was of the opinion that the value of the property involved for taxation should be fixed at $50,000.00, and no more, and so voted in the deliberations of said board of arbitrators. R. B. Young, the arbitrator appointed by the county board of tax assessors, was of the opinion that the value of the property should be reduced to $66,000.00, and so voted. Ed Pedrick, the other arbitrator, thought that the value of the property should be reduced to and fixed at $63,000.00, and so voted, and by reason of the fact that none of the three would yield their views in favor of the others, no award could

be made. And the arbitrators having come to an irreconcilable failure to agree, the ten days fixed by the statute expired with the matter in this situation, namely: that all three of the arbitrators agreed that the sum assessed by the board of tax assessors should be reduced, but no two of them could agree upon the amount to which it should be reduced, and under the provisions of the statute it took the concurrent vote of a majority of said board of arbitrators to make an award.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Petitioners.

GEORGIA,
Brooks County:

Personally appeared before me, S. M. Turner, one of the petitioners, who on oath says that the facts set out in the foregoing amendment are true.

S. M. TURNER.

33 Sworn to and subscribed before me, this the 10 day of May, 1917.

W. R. KNIGHT,
Clerk Superior Court Brooks County, Georgia.

Brooks Superior Court, in May Term, 1917.

The foregoing amendment is allowed and ordered filed.

W. E. THOMAS,
J. S. C. S. C.

In Brooks Superior Court.

H. TURNER, Executor, et al.

vs.

J. P. WADE, Sheriff.

Petition in Equity.

Now, at the May Term, 1917, of said court, the defendant having moved to dismiss the plaintiffs' petition on the ground that the same sets forth no cause of action, it is

Ordered that the motion is sustained, and said suit is dismissed, and that the defendant recover of the plaintiff for the use of the officers of the court the sum of $— costs.

In Open Court, this 16th day of May, 1917.

W. E. THOMAS,
Judge Superior Court, Southern Cir.

BENNET & HARRELL,
Attorneys for Defendant.

Clerk's Office, Superior Court of Brooks County.

Quitman, Ga., June 19, 1917.

I hereby certify that the foregoing pages hereto attached contain a true and complete transcript of such parts of the record in the case therein stated as are in the bill of exceptions specified; and that the May term of said court at which said case was tried adjourned on the 17 day of May, 1917.

34

Witness my signature and the seal of said court hereto affixed, the day and year first above written.

[SEAL.] W. R. KNIGHT, *Clerk.*

(Endorsed:) Case No. 439. March Term, 1917. Supreme Court of Georgia. S. M. Turner et al., Exrs., versus J. P. Wade, Sheriff. Transcript of Record. Filed in office June 21, 1917. W. E. Talley, D. C. S. C. Ga.

35

Supreme Court of the State of Georgia.

Clerk's Office.

Atlanta, March 28, 1918.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, citation and acknowledgment of service, also a true and complete transcript of those parts of the record in the case of H. Turner and S. Morton Turner, as executors of the estate of J. O. Morton, deceased, plaintiffs in error, versus J. P. Wade, sheriff of Brooks County, Georgia, defendant in error, which are required by the præcipe of the petitioner for writ of error in said case to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of the State of Georgia.

Endorsed on cover: File No. 26,428. Georgia Supreme Court. Term No. 961. H. Turner and S. Morton Turner, executors of the estate of J. O. Morton, deceased, plaintiffs in error, vs. J. P. Wade, Sheriff of Brooks County, Georgia. Filed April 11th, 1918. File No. 26,428.

In the Supreme Court of the United States

OCTOBER TERM, 1917

No. 961

H. TURNER and S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, Deceased,
Plaintiffs in Error,
vs.
J. P. WADE, Sheriff of Brooks County, Georgia.

In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT BY JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH AND MAX F. GOLDSTEIN, COUNSEL IN BEHALF OF THE PLAINTIFFS IN ERROR.

Abstract and Statement of the Case.

The case involves solely the constitutionality of the sixth section of what is known as the "Tax Equalization Act" of the State of Georgia—Georgia Laws of 1913, p. 127.

This enactment is as follows:

"Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

"If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county,

give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises. Said arbitration shall be had and the said arbitrator shall be compensated in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.

"Before entering upon a hearing, the said arbitrators shall take an oath before the Tax Receiver that they will faithfully and impartially make a true and just assessment of the tax returns and property in question and will determine the matters submitted to them, according to law and the justice and equity of the case."

The portion of this statute to which the constitutional objection specifically relates is that wherein it is provided that if the arbitrators who are selected to hear the controversy arising upon a dispute as to the value of the property for taxation fail to agree within 10 days, the amount assessed by the board of county tax-assessors, who act ex parte and without giving the parties any opportunity to be heard, shall be final and conclusive.

The facts, as disclosed in the record, are:

The plaintiffs in error returned their property for taxation at the value of $44,225.00. The county board of tax-assessors, ex parte and without hearing, raised this amount to $80,650.00. Thereupon, in pursuance of the statute, quoted above, they notified the plaintiffs in error of the increase. Within the time provided for by the statute they demanded arbitration and named an arbitrator. The board selected its arbitrator and these two selected the third, as provided by the statute.

The arbitrators met. All of them agreed that the value assessed by the board was excessive. The arbitrator named by the plaintiffs in error voted to fix the value at $50,000.00. The arbitrator named by the board voted to fix it at $66,000.00. The third arbitrator voted to fix it at $63,000.00. No one of them would recede from his position. The matter stood thus until "ten days from the date of the naming of the arbitrator by said board" expired. Whereupon the command of the statute was that "the decision of said board shall stand affirmed and shall be binding in the premises."

The tax-collector demanded the taxes in accordance with the value fixed by the board of county tax-assessors, namely $80,650.00. The plaintiffs in error paid the amount they conceded to be due; i. e., the sum to which the taxes would amount calculated upon the sum which they had returned them as being the true market value of the property, and refused to pay the remainder. The tax-collector issued execution for the taxes on this increase in value which had been imposed by the board

of county tax-assessors. Thereupon the plaintiffs in error brought their petition in equity to prevent the enforcement of the execution, setting up that the law by which this increase had been thus assessed against them was unconstitutional.

The judge of the superior court, acting as chancellor, on interlocutory hearing, held the statute to be unconstitutional and granted an **ad interim** injunction. The Supreme Court of Georgia reversed this action of the chancellor, holding in the opinion, which appears on page 9 of the transcript of the record in this court, that the statute was not unconstitutional.

Thereupon the defendant moved the trial court to dismiss the petition, because no cause of action was set forth, and the motion was granted. On writ of error to this final judgment the Supreme Court reiterated its former ruling and again held the act to be constitutional. (See transcript, page 10.)

The only question involved, or which has ever been involved in the case is the one decided by the Supreme Court of Georgia and excepted to, namely:

Does the enforcement of this tax-execution against the property of the plaintiffs in error deprive them of their property without due process of law, the statute having provided no opportunity for hearing and decision on the question of the value of the property, before the body that finally and conclusively assessed it; that is to say, is the statutory scheme constitutional?

Specification of Errors Relied On.

First, that the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an act of the General Assembly of Georgia approved August 14, 1913, (found in Georgia Laws for 1913, pages 123, et seq.) and especially so much of said section of said Act as provides that if the arbitrators selected in pursuance of its provisions for the purpose of adjudging and assessing the value of the tax-payer's property fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax-assessors, the decision of the board of county tax-assessors (a decision to be made without giving the tax-payer any opportunity to be heard on the question of the value of the property) shall stand affirmed and be binding in the premises, is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

Second; that the court erred in affirming the judgment of the Superior Court of Brooks county, Georgia, dismissing the plaintiffs' petition seeking redress against the enforcement of the statute aforesaid and the portion thereof above described, against the petitioners and their property, on oral demurrer, made by the defendant, on the ground that the plaintiffs' petition set forth no cause of action; and in holding that said statute and the portion

thereof complained of are constitutional and do not deprive the plaintiffs of their property without due process of law.

Third, that the court erred in holding and deciding that notwithstanding the plaintiffs in error had not had any opportunity to be heard before the county board of tax-assessors on the question of the value of their property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax-assessors, and notwithstanding it is this decision or finding of the board of county tax-assessors which is being enforced against the plaintiffs in error and their property, and notwithstanding that such enforcement is in pursuance of the provisions of said statute, and notwithstanding that the only provisions for any appeal from or review of said decision or finding of said board of county tax-assessors is by demand for an arbitration, and notwithstanding the plaintiffs in error complied fully with the provisions of said statute in attempting to obtain a hearing before a decision by arbitrators selected in pursuance of said statute, and though by no fault of the plaintiffs in error, but solely because the arbitrators failed to agree within ten days as to how much the ex parte finding of the county board of tax-assessors as to the value of the property for taxation should be reduced—all of the arbitrators who heard the evidence agreeing that it should be reduced in some amount—the only opportunity given them for a hearing on the question of the value of their property for taxation was by the terms of said statute of no avail or effect in determining or fixing the value of said property

for taxation; and notwithstanding the statute in question makes no exception on account of the failure of the arbitrators to agree within ten days or any other exception whereby the question of the value of the property for taxation could be determined after opportunity for hearing, though the failure to fix and determine the value within the time limited was due to no fault of the taxpayer, but by its terms makes the ex parte decision or finding of the county board of tax-assessors conclusive and binding in said event and substitutes the decision of the tribunal before which no opportunity for hearing is offered for the decision of the tribunal before which it is contemplated that a hearing shall be afforded—that notwithstanding all this is in pursuance of the statute itself, and the statute is being so enforced in the case presented, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment of the Constitution of the United States which forbids any state from making or enforcing any law which deprives any person of his property without due process of law.

Brief of the Argument.

The opinion of the Supreme Court of Georgia rendered in connection with its final judgment in the case (Transcript p. 10; 147 Ga. 666) merely reiterates and reannounces the opinion announced when the case was before the court on exception to the grant of the **ad interim** injunction. The opinion then rendered (Transcript p. 9; 146 Ga. 600) does not argue or discuss the question but

merely cites the case of Vestal vs. Edwards, 143 Ga. 368, as authority for the proposition that the statute in question is not unconstitutional.

While the point here made was not made in the case of Vestal vs. Edwards, and while the point there made was essentially different from the present one, still there is in that case a statement by the court which illustrates the mind of the court on the general proposition involved. This is the statement found in the opening sentence of the second paragraph on page 372 of the opinion as reported in the 143 Georgia Report, viz: "It has been held that in the matter of taxation due process of law does not require a judicial proceeding."

This statement is categorically opposed to the rule announced by the Supreme Court of the United States in the case of Central of Georgia R. Co. vs. Wright, 207 U. S. 127, 138; 52 L. ed. 134, 141 (reversing a decision by the Supreme Court of Georgia) that "Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature."

There can be no doubt of the proposition that where a statute provides for the assessment of taxes without the law itself giving the tax-payer such an opportunity to be heard at some such stage of the proceeding as to make the hearing effective in the determination of the question, there is a violation of the due process clause of the Federal Constitution.

Davidson vs. New Orleans, 96 U. S. 97; 27 L. ed. 616.

Central of Georgia R. Co. vs. Wright, 207 U. S. 127; 52 L. ed. 134.

Mere notice and opportunity for hearing, without more, will not satisfy the requirements of due process of law, if the hearing itself is subject to such limitations as to amount to a deprivation of this right. Regard must be had to substance and not merely to form.

> Fayerweather vs. Ritch, 195 U. S. 276, 297, 299; 49 L. ed. 193, 209, 210.
>
> Chicago R. Co. vs. Chicago, 166 U. S. 226; 41 L. ed. 979.

The question herein presented by the plaintiff in error is one of distinct substance, as well as one of form. The statute, which the Supreme Court of Georgia has held to prescribe the only remedy open to the tax payer, has provided a remedy which on its face, as well as in its practical application to the facts of the case, is seen to be in substance no remedy at all as to a great many cases, including the particular case presented. The tax-payer is given neither notice or opportunity to be heard before the board that assesses the value of the property for taxation. This, however, would not operate as a violation of the tax-payer's constitutional rights, if the law afforded him a method by which he could still compel a hearing and a determination of the question according to due process of law, whether by appeal to some revisory board, body or tribunal or by resort to the courts.

If the statute had provided that the board of county tax-assessors should assess the tax and had directly provided that this assessment should be conclusive, there would be no doubt as to the unconstitutionality of the statute, since this board assesses without notice or hear-

ing. Is the unconstitutionality of the provision making the assessment of this board final and conclusive, cured by another provision whereby the tax-payer may have a hearing before another body, which may or may not pass upon and decide the matter, which may without fault of the tax-payer leave it undecided, but with the condtion annexed that if this body which hears fails to decide within ten days the ex parte decision of the board of assessors shall be final and conclusive?

To state the question in different form: Is due process of law satisfied in a matter requiring action of a judicial or quasi-judicial nature by a provision for a hearing of the question before one tribunal, with the penalty attached that if within a limited period of this tribunal fails to hear it and decide it, even though no fault attach to the complaining party, the party entitled to the hearing shall be conclusively bound by the decision of another tribunal before whom he has had no opportunity to be heard?

The phrase "notice and opportunity to be heard," as used in the cases declaring the essentials of due process of law must, in the very nature of things, carry with it the notion that opportunity to be heard must relate to the decision, judgment, assessment or finding by which the person entitled to the hearing is to be bound.

If the statute had provided for a hearing before the board of county tax-assessors after notice to the tax-payer, with right of appeal to arbitrators after such a hearing and a decision therein, it would then have been competent for the legislation to declare that if the arbitrators failed to change the finding of the board within

ten days the action of the board should be conclusive. This is true because when there is a provision for a hearing after notice and for decision thereon, due process of law does not require that there should be also a right of appeal; hence, the scope of the rights of appeal in such cases may be limited according to the legislative whim or discretion. In such a case the decision which would become final, if the appeal proved abortive, would be the decision of a tribunal which had afforded an opportunity to be heard. Compare Callan vs. Wilson, 127 U. S. 540; 32 L. ed. 223.

Illustration will demonstrate the essential constitutional delinquency of the statute here involved.

Would any one deny the unconstitutionality of a statute providing that where a grand jury indicts for murder the accused may have a hearing thereon before court and jury, but that if the jury fails to agree within 24 hours (or any other length of time) the ex parte finding of the grand jury shall be taken as conclusive and binding and the defendant shall be sentenced accordingly?

Or if a statute provided that where action is begun against a defendant by attachment and seizure of the defendant's property, the defendant might file defensive proceedings, but that if by no fault of his the court failed to hear and decide the case within a limited time, the defenses should be dismissed and the attachment become final process conclusive upon the defendant for the amount claimed therein?

In neither of these supposed cases could it be said that the defendant had not been afforded notice or opportunity to be heard, if we consider merely the form and not the substance; and yet who would say that such an opportunity for hearing satisfied the defendant's constitutional guarantees?

The facts appearing in this record show not only that the statute in question **may** operate to deprive a party of his property without due process of law, but that the enforcement of it in the present case will actually produce that result.

The board of county tax-assessors without notice or hearing or opportunity for hearing, assessed a value alleged by the petition (and by the demurrer admitted) to be in excess of the true value of the property. The tax-payer acted promptly and took every step afforded by the statute to obtain a hearing and a decision as to the true value. The arbitrators—the tribunal provided for by the statute—after hearing the evidence unanimously agreed upon one point, namely, that the tax-payer is entitled to have the assessment materially reduced, but failed to make a finding which can be given effect under the statute, simply because they disagreed as to the specific amount by which the reduction should be made. The tax-payer has done all he can do under the statute. Nevertheless, after he has paid the taxes on his property at its true value, execution has been issued and is about to take his property to pay the taxes on this excess; solely for the reason that the statute so commands. Appeal has been made to equity; and the Supreme Court of Geor-

gia has held that equity cannot give relief because the statute says that the finding of the board of assessors is final and conclusive. So that unless this court gives relief by holding that the statute is unconstitutional, this party must give up his money or property to pay taxes on an excess of value established by no other means than the ex parte assessment of a board that had not heard the facts.

The crux of our contention is that due process of law involves not only notice and opportunity to be heard, but also a decision, finding or judgment, based thereon; that due process of law is a matter of substance and not merely one of form.

John A. Little
Arthur G. Powell
Marion Smith
Max F. Goldstein

Counsel for Plaintiffs in Error, H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, Deceased.

IN THE

Supreme Court of the United States

MARCH TERM 1918

No. 80

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, DECEASED,
Plaintiffs in Error,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GA.,
Defendant in Error.

In Error to the Supreme Court of the State of Georgia

BRIEF BY CLIFFORD WALKER, ATTORNEY-GENERAL, AND BENNETT & HARRELL, COUNSEL, ON BEHALF OF DEFENDANT IN ERROR.

The case is fairly stated in the brief of Counsel for Plaintiffs in Error.

An act of the Legislature, which has for its object the equalization of taxation by means of a fair and just assessment of property returned for taxation, and which provides for notice to any tax payer whose returns have been increased, and that if he is dissatisfied with the action of the county board of tax assessors in assessing the value of his property for taxation, he may demand an arbitration of the question of the valuation of the property returned for taxation, and which provides that in case of disagreement as to the selection of an umpire the county commissioners shall appoint one, the arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board is not repugnant to the due process clause of the Constitution of the United States as contained in the fourteenth amendment.

(a) Nor is it obnoxious to the due process clause of the Constitution of the State of Georgia.

(b) Nor does it deprive the tax payers of the equal protection of the law. Vestel vs. Edwards et al., 143 Ga., 368.

The registration law is not repugnant to the Fourteenth Amendment to the U. S. Constitution on the ground that it does not provide an appeal to the Superior Court from the registrars upon the question of the payment of taxes by a tax payer and voter, and therefore denies to the voter and tax payer due process of law and equal protection of the law. Bedden et al. vs. Davies et al., 139 Ga., 635.

The charter of the City of Elberton which provides for the assessment and valuation of property for taxation by a board of assessors, and requires notice to the tax payer

and an opportunity to be heard, and that the assessment shall be fixed according to the facts developed at said hearing, if one is had, is not unconstitutional as depriving the tax payer of due process of law. Van Duzer vs. Iram, 138 Ga., 534.

Charter of the City of Tallapoosa which provides that if the owner of personal property conceives that the city council has placed too great a value on his property that such owner may have such assessment reviewed by the mayor and council of said city who shall assess said property at its reasonable and just value and their decision shall be final in the premises is not contrary to the constitution of the United States and Georgia which declares no state shall deprive any person of property without due process of law. McWilliams vs. Tallapoosa, 137 Ga., 283.

The value of property for the purpose of assessing municipal taxes, as provided by the charter of the City of Bainbridge, is to be ascertained and determined by the legally constituted authorities established for that purpose in said municipality and not by judicial proceedings; an assessment made in the prescribed mode without fraud or collusion is final and conclusive upon the question of value as a basis of taxation for the time being. Bower vs. City of Bainbridge, 116 Ga., 794.

See Acts of 1910, page 24, Section 4, which provides for arbitration of tax returns.

Acts of 1913, page 123, System of equalization.

Headnote of above, "To provide for just and adequate returns of property for taxation and secure the equitable valuation thereof, etc." Page 125, Section 4, "Upon petition to the judge of the Superior Court by 10 or more freeholders of the county that any one or more of the members of the county board of tax assessors are disqualified, or are not properly and impartially discharging their duties or are discriminating in favor of certain citi-

zens. The judge shall cite the members of the board of tax assessors to appear, etc." Page 127, Section 6, "If in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property and a fair and just valuation, the said board shall correct such returns and assess and fix the just and fair valuation to be placed upon the property.....and the valuations as between the tax payers are fairly and justly equalized so that each tax payer shall pay his proportionate tax." Page 128, arbitration of returns, "The arbitrators shall render their decision within ten days else the decision of said board shall stand affirmed and be binding."

Code 1097, duty of tax receiver carefully scrutinize returns. 1098 give the tax payer notice of raise and arbitrate it.

White vs. Forsythe, 138 Ga., 756, headnote 11, it was held in this case that if the acts of 1902 failed to sufficiently provide for notice to the tax payer that the act of Aug. 13, 1910, page 25, made provisions.

Due process of law not afforded by the Law of Georgia which provides that the valuation of property not returned for taxation made by the assessing officer without notice or opportunity for hearing concludes the tax payer both in the tax proceedings and in the court unless he can show bad faith, etc. Cen. of Ga. vs. Wright, 207 U. S., page 48.

In this country as in England, the necessities of government, the nature of the duties to be performed, and custom and usage, have established a proceedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice but which is still due process of law within the meaning of the Constitution. Kelley vs. City of Pittsburg, 104 U. S., 658.

It is alleged and probably with truth that the estimate of the value of this land for taxation is very greatly

in excess of the true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct in this court the errors and mistakes of the State tribunals on that subject that we can only refer to those decisions without a restatement of the argument. Ibid 659.

The Constitutional provision that no State shall deprive any persón of life, liberty or property without due process of law does not require the person taxed by the law of the State shall be present or have an opportunity to be present when the tax is assessed against them.

Nor does it require that taxes shall be collected by a judicial proceeding. McMillan vs. Anderson, 95 U. S., page 335.

In the case of Central of Georgia Ry. Co. vs. Wm. A. Wright, 207 U. S., 47, it was held that the method pursued in that instance was unconstitutional because it deprived defendant of its property without due process of law because in that instance the defendant had failed to return certain property, claiming that it was not subject to taxation in Georgia. The Comptroller-General insisted that it was and affixed a valuation upon the property, the defendant having no hearing whatever. It was in that instance as the defendant was acting in good faith and did not withhold the property from taxation for the purpose of defrauding the State, but because this species of property had not been subject to taxation for some time in Georgia. That in that instance it was a deprivation of property without due process of law.

In the instant case the property was returned, the valuation raised by the tax assessors, the defendant notified and given a chance to arbitrate. He selected his arbitrator and as the arbitration failed according to law the valuation fixed by the assessors became the proper valuation. In this instance he had due notice and an opportunity to be heard and the failure to obtain the relief

was due doubtless to the fact that the arbitration failed. It is presumed that there was a hearing before the arbitrators and as they could not agree upon the valuation then the valuation fixed by the assessors became the proper valuation.

The court may review the valuation placed on property for taxation, where the record shows that it was imposed in a whimsical, capricious or unwarrantable way instead of by the judgment since such valuation would be no assessment. Consol. Gas Co. vs. Baltimore, 1 L. R. A., 263.

An appeal is not necessary to enable a board of equalization to revise a tax assessment under a statute providing that the board was created for the purpose of revising the assessment when returned by a tax assessor. State N. Bank vs. Memphis, 7 L. R. A., 663.

In the absence of grounds justifying a resort to a court of equity for injunctive relief, the decision of the statutory board of equalization, declining to reduce the assessed valuation of lands, is plenary and final. Finney County vs. Bullard, 16 L. R. A., 807.

The State may subject to the doom of the assessor a tax payer who has failed to furnish a list of his property to the assessor as required by law, but not where the failure to make such returns was without fraudulent intent and from an honest belief, founded upon reasonable grounds that what property he had was not taxable. Travelers Ins. Co. vs. Board of Assessors, 24 L. R. A., 389 (2).

The assessment of property for purposes of taxation is not a judicial function and under the Kansas law providing for an appeal from the county board of equalization to the district court, is unconstitutional and void. 13 L. R. A., 716. See notes under same.

Under the Tennessee statutes, the board of equalization may either increase or reduce assessments; and an

increase is not rendered invalid by the fact that it is made by the board at its own motion, and not in a proceeding had pursuant to an appeal prosecuted by a tax payer. State N. Bank vs. Memphis A. & E. Anne. Cases. Vol. 8, page 22.

The proceeding of a board to equalize taxes, if conducted in good faith and within its jurisdiction, are final and conclusive.

The presumption is in favor of the regularity of the proceeding of commissioners to equalize taxes, and whoever attacks them must show affirmatively qant of jurisdiction. A. & E. Ann. Cases Vol. 8, 595.

Statutes creating boards to review the equalization of taxes by county board are not in contravention of the due process of law clause of the Constitution of the United States because no provision is made of giving notice to tax payers nor do such statutes deny to the tax payer the equal protection of the law within the meaning of the Federal Constitution. Ibid 596.

The Wyoming statutes providing that the county board of equalization "Shall at its first meeting add to said assessment roll any taxable property in that county not and assess the value thereof," give such board full powincluded in the assessment as returned by the assessor er to add omitted taxable property to the roll and assess its value, although the property has not been assessed and the name of the owner does not appear upon the assessment roll until entered thereon by the board. Fred Horton vs. Driskell, A. & E. Ann. Cases, Vol 3, 561.

It is well established that an injunction will not lie to restrain the collection of taxes because of the irregularities or informalities in the assessment thereof. See note to above. See 59 Ga., 805.

CLIFFORD WALKER,
Attorney-General.
BENNETT & HARRELL,
Counsel for Defendant in Error.

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 29.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. C. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. F. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF BY ARTHUR G. POWELL, COUNSEL FOR PLAINTIFF IN ERROR, IN REPLY TO SUPPLEMENTAL BRIEF FILED BY COUNSEL FOR DEFENDANT IN ERROR.

Filed Under Special Leave of the Court Granted at the Time of the Argument.

(For brevity, statutes already set out in the opposing brief are not again requoted.)

The supplemental brief which has been filed in this case by the defendant in error was not filed or served until counsel were already in Washington for the reargument. It pre-

sents an entirely new theory of the case—a theory not suggested in the argument in any of the State courts in which the case was tried, nor in the former briefs or arguments in this court.

Counsel for defendant in error, now conceding that the provision of the Georgia Tax Act in question which makes the finding of the equalization board (the Board of Tax Assessors) final in the event the arbitrators fail to agree within ten days is unconstitutional unless the equalization board is, by the statute, required to give the taxpayer notice and opportunity to be heard, present in their supplemental brief the new proposition that this court should, by process of judicial interpretation, read into the act a provision (admittedly absent from it so far as any language therein contained is concerned) by which the equalization board is charged with the duty of affording the taxpayer notice and opportunity to be heard.

The objections to this court's giving to the act any such interpretation are:

(1) It would erect a statutory scheme not contemplated by the legislative body in enacting the statute.

(2) Such an interpretation would be contrary to the construction which has been uniformly given to the act hitherto by the actual practice under it.

(3) Such an interpretation would be contrary to the construction which manifestly, by implication, if not by direct language, has been given to the act by the highest court of the State of Georgia.

Considering these propositions in order:

The legislative body of Georgia in enacting this statute manifestly intended to constitute the board of tax-assessors as an inquisitorial agency and not as a judicial or quasi-judicial tribunal. Their duty, like the duty of the Grand

Jury (the common inquisitorial body of the country), is "diligently to inquire," first, and chiefly, as to whether there is taxable property in the county which has not been returned for taxation and, then, whether that which has been returned has been returned at its fair market value.

They are given by section 7 of the act power to subpœna any witnesses or to require the production of books and papers "which may throw any light upon the question of the *existence or liability* of property of any class for taxation.

It is argued that this grant of this power connotes that the tax assessors are charged with the duty of giving taxpayers a hearing. On the contrary, the language shows that it relates to the duty of the tax assessors to seek out unreturned taxable property and to compel its addition to the tax digests. A grand jury is a purely inquisitorial body; and it has this same power as to witnesses, books and papers.

Indeed, in Georgia, prior to 1910, the duty imposed on the tax assessors as to scanning and noting increases in tax returns of individual taxpayers devolved on the grand jury. Sections 1198 and 1199 of the Civil Code of Georgia, which have been superseded, provided:

> §1198. "The tax receiver in each county at each fall term of the superior court in his county, shall lay before the grand jury his returns for that year of taxable property, and the grand jury shall overlook the same; and wherever they find an undervaluation they shall correctly assess it according to the market value of the property and deliver to the receiver his returns with the correction."
>
> §1199. "When the receiver shall receive his returns for the next succeeding year and the corrected returns made by the grand jury, it shall be his guide for that year, and if the taxpayer shall return his

> property below the valuation made by the grand jury, the receiver and taxpayer each shall select an arbitrator; and these two shall select an umpire, to whom the question of valuation shall be referred; and if the arbitrators fail to agree on a valuation of the property, or fail to select an umpire, in thirty days after receiving notice of their appointment, this fact shall be reported to the ordinary or the chairman of the county commissioners (as the case may be), who shall forthwith appoint two arbitrators, who with the arbitrator appointed by the taxpayer shall fix the value of the property, and their award shall be returned to the receiver, and shall be entered by him as the valuation of said taxpayer's property."

This statute remained in force nearly forty years. No one ever assumed that the duty of the grand jury under it was more than inquisitorial, with right to make a provisional finding. No one ever assumed that the grand jury was under any duty to give the taxpayer a hearing. Due process of law was afforded the taxpayer through the provision for arbitration under section 1199 just quoted.

In 1910 (Georgia Laws, 1910, p. 24) an act was passed, the material provisions of which are as follows:

> SEC. 4. "Where the property subject to said tax is such as is returnable annually to the tax receiver of the county, that officer shall assess the same at the valuation fixed in the annual returns, if satisfactory to him; if not, he shall within 30 days after receiving said returns, make an assessment of said property from the best information he can procure, and notify, in writing, the person or officer making the returns, who shall have the privilege within 20 days after receiving such notice, to refer the question of the true value to arbitrators, one to be chosen by him-

self and one to be chosen by the tax receiver, with power to choose an umpire in case of disagreement, and their award shall be final. * * * Should the taxpayer desire to contest the taxability of said property under this section, he may do so by petition in equity in the superior court of the county where said property is assessed. Should the two arbitrators provided for in this section fail to agree upon the value of the property, and fail to name an umpire within 20 days after their appointment, the umpire shall be named by the ordinary or county board of commissioners, as the case may be."

In the act of 1913, now before us, the legislature merely intended to transfer to the board of tax assessors this function formerly given to the grand jury and later to the tax receiver. And it has always so been understood in Georgia.

Now for this court to hold that the legislature intended for this board of tax assessors to hold public hearings, and that every person, resident or non-resident, having taxable property in the county should be on the *qui vive* from the 10th of May to the 1st of July of each year, in order to be heard if the board should be of the opinion that he had property which he had not returned or of the opinion that the value stated in the return he had made was too low, would be to convert this board which the legislature intended to function only through *ex parte* investigation and the instigation of the proceedings by which property should be added to the tax lists or the value of returned property should be increased, into a quasi-judicial tribunal, on the sittings of which every person who had property in the State must attend or from which he should be absent at his peril. The taxpayers of a county do not necessarily reside in the county. Residents and non-residents alike would be affected. The legislature manifestly did not intend to provide any such system; and the courts should not give to the law an

interpretation which would read any such a system into it.

The language of the act does not authorize the interpretation which our able adversaries ask this court to place on it. If it had been intended that this board of assessors should have public hearings and that it should give the taxpayers opportunity to be heard, it would have been easy to say so. If the legislature had intended that the tax assessors should give the taxpayer a hearing and thereby satisfy the requirement of due process of law as to him, there would have been no need for the provision by which the board must notify him of its action after it has been taken and for the hearing before arbitrators.

If the court will now turn to the case of *Central of Georgia R. Co. vs. Wright*, 207 U. S., 127; 52 L. Ed., 134, it will find there quoted, in connection with the opinion, the Georgia statute by which corporate property is returned and assessed. In Georgia, corporate property (with certain exceptions) is returned to the Comptroller-General; the property of individuals to the tax receiver. As to corporate returns, the Comptroller-General performs the functions performed by the tax assessors as to individual returns. It is to be seen that the language of the statute under review in the case of *Central Railroad vs. Wright, supra*, is practically identical at salient points with the language of the statute now *sub judice*. This court there held that while that act may have allowed the Comptroller-General to give the taxpayer a hearing as a matter of grace, it did not afford a hearing as a matter of right. That statute provided, as does the present statute, for an arbitration, but made the finding of the Comptroller-General final in certain instances. Likewise, this statute provides for an arbitration but makes the finding of the tax assessors final in certain instances. In that case which fell within the category which made the decision of the Comptroller-General final, the court held the statute *pro tanto* unconstitutional. In this case, which falls within the

category which makes the decision of the tax assessors, performing the identical function, final, we urge a like result.

As to the third point, that actual practice under the act has been contrary to the construction here sought by the defendant in error, we do not understand that there is any dispute as between counsel. We understood the able Assistant Attorney-General of Georgia to concede in his argument that as a matter of practice these boards of tax assessors have not hitherto given such hearings (except in rare instances as a matter of grace) and have not considered themselves as bound to give any such hearing.

The thing most potent with this court is the construction given to the act by the Supreme Court of Georgia. If one will read the petition in equity filed by the taxpayer in this case, and will keep in mind that the petition was dismissed on motion to strike, in the nature of general demurrer (all the allegations of the petition being thereby admitted, under the Georgia practice) and will then read the short opinion of the court, one will have no serious doubt as to the construction implicitly put on the act by the Georgia court.

The petition alleged in par. 5 (Tr., print, p. 13) that the tax assessors acted "without having any hearing from your petitioners;" also in par. 19 (Tr., print, p. 15) "the assessment referred to was made by said county board of tax assessors without notice to your petitioners or to any one else representing said estate, and without opportunity to them to be heard, and without there being any provision of law by which such notice could be given or such opportunity to be heard afforded. The statute under which said board acted does not contemplate or provide for giving the taxpayer a hearing before said board, but contemplates and provides that such hearing, or proceeding in the nature of a hearing, as is to be had or afforded shall be before the arbitrators provided for in said statute, and this is the only opportunity for hearing which the statute contemplates or

which was in fact afforded to your petitioners or said estate."

The petition sets out fully the construction given to the act by the petition, and points out the particular feature by which he claims to have been deprived of his constitutional rights.

When the Supreme Court of Georgia came to pass on the matter, it in no wise challenged these statements (neither statements of fact, which it could not have challenged, since the sustaining of the motion to dismiss rendered them judicially indisputable, nor statements of the meaning and operation of the statute).

The court makes no mention or suggestion of any opportunity to be heard before the tax assessors. On the contrary, the opinion recites that the act requires of the tax-assessors an "examination of the returns" and a duty to "assess." "When any change is made * * * such taxpayer must be given *notice of such change*. If the taxpayer is dissatisfied, he may demand an arbitration and *have a hearing before arbitrators.*"

If the court had construed the act as giving the taxpayer opportunity to be heard before the assessors, a simple statement of that fact would have ended the case; except that in that event the court would have reversed the judgment for errorr of the tax assessors in not giving a hearing, since the petition alleged that they had failed to give such a hearing.

The court cites *Vestal vs. Edwards,* 143 Ga., 368. That case is fuller and shows even more clearly that the court did not consider the act as giving a hearing before the assessors. The first headnote (and, in Georgia, under Civil Code §6202, the headnote or syllabus is the real decision of the court, and the opinion is merely elaboration) in that case describes the act just as we have described it. Neither in the headnotes nor in the opinion is there any suggestion of a hearing before the tax assessors. (See also the court's

summary of the provisions of the act on p. 372 of the opinion.) Throughout the opinion the court having before it the question of "due process of law," in that connection elaborates only the provisions as to the arbitration. The court cites §§1097 *et seq.* of the Code, which is the statutory scheme of increasing undervalued returns by action of the tax receiver with provision for arbitration, the material portions of which have been previously quoted in this brief. The court also refers to the act of 1910. That act is entitled:

> "An act to provide for a method of assessing and collecting taxes where such taxes are authorized, and no adequate provision is made in the act authorizing the same, or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property subject thereto."

The provision of that act referred to by the court has been quoted above in this brief.

On page 374 of the opinion the court reads the provisions of this statute into the act of 1913; thereby plainly, though implicitly, holding that the act of 1913 was relieved of repugnance to the Federal Constitution by reason of the provision in the act of 1910 that the ordinary could appoint the third arbitrator or umpire—the delinquency complained of in that case being the lack of provision for a third arbitrator when the two selected failed to agree.

The second division of the opinion in that case is illuminating on the subject before us. It held that the trial judge should have entertained equity jurisdiction and granted the injunction because the arbitrator selected by the assessors was kin to one of the tax assessors, basing the holding on the ground that the tax assessors were parties to the arbitration proceedings. It will hardly be assumed that the legislature of Georgia intended that the same persons who were to be parties in one phase of the proceeding, should be judges, so

to speak, in the other. While such a dual relationship is probably legally possible, it is so foreign to our common sense of propriety and judicial decency as that the court will be slow to read such an interpretation into a legislative act.

This court will endeavor, within limits of fair reasoning, to uphold statutes attacked for repugnancy to the Constitution, though it will not go to limits of legal absurdity to achieve that end. But in this case, plaintiffs in error do not ask the court to destroy the statute, but ask the court merely to limit it in such a way as will render its workings conformable to the Constitution, and will thereby improve it. We attack only so much of the act as makes the *ex parte* finding of the tax assessors final in the event the arbitrators fail to agree within ten days. The Supreme Court of Georgia has upheld this provision and thereupon held that, since the statute gives due process of law, the taxpayer cannot resort to equity under the act of 1910, quoted above, or the general principles of equity jurisprudence; for the act of 1910 gives resort to equity only when, as its title discloses, the existing laws fail to give due process of law. If this court holds this feature of the act unconstitutional, the only change in the system is that the taxpayer, instead of being precluded by the finding of the tax assessors, may pay the tax he concedes to be due in his return and litigate in equity as to whether his return should be increased or not.

We should further notice the opposing supplemental brief to the extent of calling attention to an error. On page 6 of that brief it is said that the tax assessors are county officers and that the Code requires the Ordinary to provide them rooms in the courthouse. We understood our fair opponent to concede in his argument or in answer to the question of one of the justices that he was in error as to this. The tax assessors are not county officers (that being a phrase taken from our Constitution, and in fact do not meet at the courthouse, unless, as sometimes happens, they get permission to use some room there as a convenient meeting place. (See

the notice in the transcript and the last line of print, p. 17.)

The cases cited by opposing counsel are plainly differentiated from the case at bar, which is controlled by *Central R. Co. vs. Wright,* 207 U. S., 127.

For example, in *Lander vs. Mercantile Bank,* 186 U. S., 458; 46 L. Ed., 1247, the board in question was by direct language of the statute required to "hear complainants as to assessments;" and it expressly provided for notice for that purpose.

The same is true as to the statute in question in *Merchants Bank vs. Pennsylvania,* 167 U. S., 461; 42 L. Ed., 236.

In the *Kentucky Railroad Tax Cases,* 115 U. S., 321; 29 L. Ed., 414, the question was whether the hearing afforded by the statute there involved was one of grace or one of right and this court followed an express adjudication of the highest court of the State, holding that the hearing was a matter of right. (See top of page 8 of opposing supplemental brief.)

An examination of the *State Railroad Tax Cases,* 92 U. S., 575; 23 L. Ed., 663, will disclose that those cases did not involve the question here involved, or if it was involved, it had been precluded by the construction given by the Supreme Court of Illinois to its own statute.

In *Pittsburgh R. Co. vs. Backus,* 154 U. S., 421, this court merely followed the decision of the State Supreme Court in holding that the act provided a hearing before the board of assessors as a matter of right and not as a matter of grace.

The case of *Bi-Metallic Inv. Co. vs. State Board of Equalizers,* 239 U. S., 441; 60 L. Ed., 372, deals with an entirely different phase of taxation and is not here in point.

The other cases cited by opposing counsel readily distinguish themselves on similar grounds.

Respectfully submitted,

ARTHUR G. POWELL,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 29.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. C. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

SUPPLEMENTAL BRIEF BY R. A. DENNY, ATTORNEY GENERAL OF GEORGIA, AND GRAHAM WRIGHT, ASSISTANT ATTORNEY GENERAL OF GEORGIA, ON BEHALF OF DEFENDANT IN ERROR.

We desire in this supplemental brief to present to the court a theory of this case which has not heretofore been presented in the brief for defendant in error. Stated concisely, the theory or view which we desire to present to the court is this:

The tax equalization law of Georgia, now involved before this court, provides ample notice and opportunity for hearing without the arbitration proceedings therein provided for, in that this law gives the time and place of the meetings of this board of assessors, which this court has repeatedly ruled is sufficient notice to comply with the due-process clause of the Constitution. The arbitration provided for in this law is in the nature of an appeal, which this court has held, and which counsel for plaintiff in error admit, is not essential to due process of law in tax matters.

Under this view of the case, let us analyze for a moment the tax laws of Georgia and the tax equalization act of 1913. Under the Georgia system of taxation all persons are required to make returns of their property for taxation. Code section 1010 of the Code of Georgia, 1910, provides:

> "All property or other thing of value, subject to taxation, must be given in by the tax-payers, as hereafter set forth, at its fair market value and must be taxed according to its value on an assessment to be made by the Governor, with the assistance of the Comptroller General."

The laws of Georgia then provide that the returns of railroads and other corporations (specifically designated) shall be made to the Comptroller General of the State. A citation of the laws requiring these returns is unnecessary, as these returns are not affected by the act of 1913, now before this court.

Code section 1075 of the Code of Georgia, 1910, provides:

> "All other companies or persons taxed shall make their returns of personal property to the receiver of the respective counties where the persons reside or the office of the company is located," etc. (The remainder of this section, being immaterial to the question involved, is not here quoted.)

Code section 1 68 of the Code of Georgia, 1910, provides:

> "All lands in this State, subject to taxation, whether improved or unimproved, shall be returned by the person or persons owning the same, his, her, or their agent or attorney, to the receiver of the county where the land lies," etc. (The remainder of this section, being immaterial to the question, is not here quoted.)

The tax equalization law of 1913 provides the time when the tax receivers of the State (who are county officers and are in each county of the State) shall open and close their books to receive returns and for the disposition of these returns by them.

Section 1 of this act provides (Georgia Laws, 1913, page 123, section 2):

> "* * * That the several tax receivers of this State shall open their books for returns of taxes on the first day of February and shall close the same on the first day of May of each year, and within ten days thereafter it shall be the duty of the tax receiver of each county to present the tax returns of the county for the current year to the county board of tax assessors created by this act for the purposes herein contemplated and provided. * * *" (The remainder of this section, being immaterial to question, is not here quoted.)

The board of county tax assessors created by this act consists of three members, who are sworn and commissioned. Section 5 of this act provides (Georgia Laws, 1913, page 128):

> "That the county board of tax assessors shall elect one of their number as chairman for such term as they shall fix but not to be less than two (2) years. The said board shall have authority to employ a competent person to serve as secretary of said board. He shall keep a record of the proceedings of said board and shall receive for his services in this

capacity the sum of three ($3.00) dollars per day, while actually attending sessions of said board; the same to be paid out of the county treasury in the same manner in which other county payments are made. * * *" (The remainder of this section, being immaterial to the question, is not here quoted.)

Section 6 of this act provides (Georgia Laws, 1913, page 127):

"That the said board of county tax assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the tax receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax-payer, and if in the opinion of the board any tax-payer has omitted from his return any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax-payers are fairly and justly equalized so that each tax-payer shall pay, as near as may be, only his proportionate share of taxes * * *," etc. (The remainder of this section, being immaterial to this question, is not here quoted.)

Section 7 of this act provides (Georgia Laws, 1913, page 128):

"That it shall be the duty of the county board of tax assessors to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper return for taxation.

> "The said board shall have authority to issue subpœnas for the attendance of witnesses and to require the production by any person of all his books, papers and documents, which may throw any light upon the question of the existence or liability of property of any class for taxation. If any witness so subpœnaed shall fail or refuse to produce any such books, papers, or documents, such person * * * punishment as for a contempt * * *." (The remainder of this section, being immaterial to this question, is not here quoted.)

Section 10 of this act provides (Georgia Laws, 1913, page 129):

> "That said county boards of tax assessors shall complete their revision and assessment of the returns of the tax-payers in their respective counties by July 1st of each year." (The remainder of this section, being immaterial to this question, is not here quoted.)

These provisions of the law under attack are, we submit, controlling in this case. They measure up fully to the requirements of due process as laid down by this court, in that they constitute notice of the time and place at which the assessment is to be made. The time is clearly fixed as beginning within ten days after the first day of May and ending on the first day of July. It may be contended that the beginning "within ten days" is not definite enough, but in reply to this we submit the decision of this court in the case of Louder *vs.* Mercantile Bank, 186 U. S., page 458, where, on pages 468 and 469, the court said:

> "We agree with the Court of Appeals that some notice was necessary to be given, and the question occurs, did the statute give notice by fixing the time of the meeting of the board? It seems to be conceded that the statute did so as to the first meeting of the board, and that such notice would have been sufficient as to subsequent adjournments if they had been made to days certain. * * * We do not

> think the principle of those cases is affected by an adjournment of the Ohio board without giving a date of meeting. * * * The board was a public tribunal open to be invoked, and charged with duties and necessarily subject to adjournment. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exercise of a very trifling trouble, the bank would have been informed of every meeting of the board."

The place is likewise clearly fixed by this law. There is a board of assessors for each county of the State. These men composing these boards are county officers. Code section 401, Georgia Code, 1910, provides:

> "Such ordinary shall designate the rooms of the court-house to be occupied by each of the county officers, and enter the same on their minutes, which they may change from time to time as convenience requires."

This court has held, in the case of Andes *vs.* Ely, 158 U. S., pages 313-323:

> "Where a notice fails to name any other place it will be presumed that the place intended is the regular office of the county judge."

And this rule has been applied to the very questions now involved.

In the case of Merchants Bank *vs.* Pennsylvania, 167 U. S., pages 461-466, it was said:

> "The statute defines the time when the bank shall make its report to the auditor general and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provisions to the contrary, to be had at the office of the officer charged with the duties

> * * * and a notice to all property-holders of the time and place at which the assessment is to be made is all that 'due process' requires in respect to the matter of notice in tax proceedings."

We submit, therefore, that this law constitutes notice to every tax-payer of the time and place at which the assessment is to be made.

But one other question could be raised, and that is the right of a tax-payer to complain before this board. While it is true that the act does not in express language confer this right, still that such right exists cannot be questioned from a reading of the sections quoted above. It does not appear from the pleadings that any attempt was made to be heard by this board or that they refused it.

Though the Supreme Court of Georgia has several times passed upon this law, in no case has it held that this board could not hear and consider the evidence of the tax-payer.

In the case of Vestal *vs.* Edwards, 143d Georgia, page 368, the Supreme Court of Georgia held this law to be valid. In this decision it neither held that the board of assessors could or could not hear complaint of the tax-payer, but on pages 372-373 of the decision the intimation is strong that such complaints could be heard by them, and from a reading of the law it seems clear that this must be true. Under these facts we submit that this court will not apply to this law a construction which would render it unconstitutional. In fact, this court has passed upon the identical question here raised in

> The Kentucky Railroad Tax Cases, 115 U. S., page 321,

where this court held:

> "It is said, however, by counsel for the plaintiff in error in argument that whatever was in fact this alleged hearing it could only have been accorded as

> a matter of grace and favor because it was not demandable as of right under the law and consequently has no such legal value as attaches to a hearing to which the law gives a right. * * * But such is not the construction put upon the statute as we have seen, by the Court of Appeals of this State, nor the practical construction as we infer from the averments of the pleadings, put upon it by the officers called to act under it, and if plaintiffs in error have the constitutional right to such a hearing for which they contend, the statute is properly to be construed so as to recognize and respect it and not to deny it. The Constitution and the statute will be construed together as one law."

Had the Supreme Court of Georgia passed upon this law and held that the tax-payer could not be heard by the assessors, a different question would be here presented, but it has not done so, and therefore this court is free to construe the law in accordance with the statement quoted above.

We respectfully submit that we have, therefore, in this case, the three essential elements to make "due process" as repeatedly held by this court, to wit, notice by the statute to all tax-payers of the time and place of the meeting of the assessors and a board of assessor competent and able to hear their complaint.

This court, beginning with

> The State Railroad Tax Cases, 92 U. S., page 575,

has repeatedly held this sufficient to comply with the "due-process" clause.

In that case the law was quite similar to the present law of Georgia, and, considering the question, this court, on page 609 of the opinion, said:

> "The statute requires the proper officers of the railroad companies to furnish to the State auditor a schedule of the various elements already mentioned

as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimate without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us, that for want of this notice the whole assessment of the property and levy of taxes is void.

"It is hard to believe that such a proposition can be seriously made. * * * The very moment you come to apply to the individual the right claimed by the corporation in this case its absurdity is apparent. Nor is there any hardship in the matter.

"This board (of tax equalization) has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

Following this, in the Kentucky Railroad Tax Cases, 115 U. S., page 321, a statute very similar to the Georgia statute was under consideration. This statute provided that returns should be made by all railroad companies to the auditor of public accounts, and that he should lay these returns before the State board of equalization. This board was required to meet on the first day of September in each year, and should the valuations or any of them, in the judgment of the board, be too high or too low, the board shall correct and equalize the same by proper increase or decrease thereof. It is then provided that the tax due shall be collected by suit against the railroad company. The Supreme Court held:

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes is not necessarily judicial and that due process of law as applied to that subject does not imply or require the right to such notice and hearing as are considered essential to the

validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient. * * * The railroad company, by its president, or chief officer, is required by law at a specified time to return to the auditor of public accounts the property of the company. * * * This return made by the corporation, through its officers, is the statement of its own case and may be verified and fortified by such explanation and proof as it may see fit to insert. * * * It is laid by the auditor of public accounts before the board of railroad equalization and constitutes the matter upon which they are to act. They are required to meet on the first day of September of each year at the office of the auditor at the seat of government when these returns are submitted to them. * * * And in the performance of these duties their sessions are limited to a period of not longer than twenty days in any one year.

"These meetings are public and not secret. The time and place for holding them are fixed by law. The proceedings of the board are made matters of record and authenticated by the signatures of the quorum present. Any one interested has the right to be present. * * *"

And again, in the case of Pittsburgh, Cincinnati, Chicago and Saint Louis Railway Co. *vs.* Backus, 154 U. S., pages 421-425, this court said:

"It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the State board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice cannot be given at some time in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board and that is sufficient in tax

> proceedings; personal notice is unnecessary. It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board and that no notice was given of such valuation in time to take any steps for the correction of error thereon. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur in that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged vital."

And again, in the recent case of Bi-Metallic Inv. Co. *vs.* State Board of Equalization, 239 U. S., page 441, this court decided:

> "An order of the State board of equalization of Colorado increasing the valuation of all taxable property in the city of Denver forty per cent which was sustained by the Supreme Court of the State, held not to be in violation of the due process provision of the 14th amendment because no opportunity was given to the tax-payers or assessing officers of Denver to be heard before the order was made."

See also upon this question:

> Hagar *vs.* Reclamation District, 111 U. S., page 701.
> Glidden *vs.* Harrington, 189 U. S., page 259.
> Londoner *vs.* Denver, 201 U. S., page 385.
> Pullman Co. *vs.* Knott, 235 U. S., page 23.

Under this view of the case, we respectfully submit that the due-process clause is complied with by this law without reference to the arbitration proceeding which is so much referred to by counsel for plaintiffs in error. This arbitration proceeding, we submit, is nothing more than an appeal, which is not necessary to due process. And the State of

Georgia has the power to provide for the affirmation of the judgment of the lower tribunal through a failure of the appellate court to agree.

Lott *vs.* Pittman, 243 U. S., page 588.

We respectfully submit that the Supreme Court of Georgia has not erred in its ruling complained of, and that the judgment under review should stand affirmed.

Respectfully submitted,

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